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CURRENT TOPICS

General Smuts

IN the universal mourning that has followed the death of a great world statesman, it is right for lawyers to remember that GENERAL SMUTS would have been the first to acknowledge the debt that he owed to the legal profession for which he was trained, and for which his fairness and instinctive respect for the principle *audi alteram partem* so well fitted him. Although his military and political careers were eventually paramount, it was law which he read at Cambridge, where he obtained a double first, and it was in London that he was called to the Bar and actually devilled for a time. Members of both branches of the profession remember with pride that he became a Bencher of the Middle Temple, that he was an Honorary Fellow of Christ's College, Cambridge, where he had been an undergraduate, that since 1948 he was Chancellor of Cambridge University, and that he was a King's Counsel. Many other honours and distinctions, including membership of the Order of Merit and the Companionship of Honour, were heaped on him. The world stands in need of such men, and suffers a great loss in his passing.

The Annual Conference of The Law Society

THE President of The Law Society, Mr. L. S. HOLMES, LL.M., J.P., will deliver his inaugural address on Tuesday, 26th September, to the Annual Conference, 1950, which takes place at Torquay next week from 25th to 29th September. The address will be followed by a discussion of the work of the Council, which is not to be limited to matters arising out of the address. The discussions of the work of the various committees will be held on Tuesday afternoon (Legal Aid and Salaried Solicitors), Wednesday morning (Scale and Professional Purposes), and Wednesday afternoon (Scale and Constitution of the Society), and the reports will be made at the Final Plenary Session on Thursday afternoon. The agenda for these meetings are printed in the programme of the Conference, and members who wish to raise specific questions on the work of the committees are asked to set them out in a letter to the Secretary. On Thursday morning the Conference will hear an address by the Hon. Mr. Justice CASSELS on "The Glories of the Legal Profession." The Conference will be welcomed by the Mayor of Torquay, who will also give a reception in the Town Hall on Tuesday evening. An attractive programme of social functions and sports which includes dances, a cocktail party, a dress show, a river cruise, a coach trip, golf matches, sailing races and a visit to the theatre should ensure that no member has an unwillingly idle moment. We cordially wish this third post-war provincial meeting the same success that its two predecessors have had.

Accident Courts of Experts ?

THE suggestion has been made, not for the first time, that special courts of experts should sit to deal with accident cases. This time it is the Municipal Passenger Transport Association, at its annual conference in Edinburgh, on

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13th September, which has revived the idea. Mr. H. MUSCROFT, the Huddersfield delegate, put it forward, and added that such courts should deal with accidents not only on the roads, but also in the factories. As far as road accidents are concerned, it may be asked, who are the experts? Are they motor engineers or professional drivers, champion cyclists or winners of walking races? One may foresee that if the proposal were seriously entertained by the authorities, a new apple of discord would be thrown between the motorists' organisations and the Pedestrians' Association. Not so many years ago, running down actions were frequently tried with juries, who exercised their commonsense as to what was careless conduct on the part of road users. Those who conducted their cases before juries, like those who conduct accident cases nowadays before non-expert judges, had every confidence in them. In the few cases in which any technical issue arises, intelligible expert evidence is never lacking, and is usually violently divergent on either side. After all, it is an expert task to be a judge at all, so that the proposal would involve the tribunal's having a double qualification of expertise. Lawyers, at any rate, who are familiar with experts as witnesses reserve their own well-known opinion about them, and would never favour them in the role of judges.

A Local Government Enterprise

ALL sections of the public are now more alive than they were to the responsibilities which, as a community and as individuals, they bear to children whose lives are lacking in the greatest of all the advantages of civilisation—a settled home with one's own parents. But to appreciate the problem is not necessarily to understand the details of the partial solution which, in recent times, Parliament has initiated in the Adoption Acts and the other measures dealing with child welfare. Indeed, we suspect that a good deal of the time of the children's officers appointed by county and county borough councils under s. 41 of the Children Act, 1948, is occupied in explaining their functions and the duties of the authorities they represent. We have read with great interest a series of notes issued by the Town Clerk of Manchester which cannot fail to make this task easier, and which will bring home to those to whom they are distributed the most important of the many details which intending adopters and foster parents ought to know. Separate leaflets deal with foster children and with adoption arrangements, and there are also some useful notes on certificates of adoption, insurance matters, wills and intestacies, marriage, and savings, produced in duplicated form for the assistance of those who have adopted children. Copies of the notes may, it is understood, be obtained from the Children's Officer, Town Hall, Manchester. Yet another leaflet sets out clearly the position with regard to alterations in and additions to a child's Christian names. If we may, we should like to commend to all local authorities this "news-spreading" enterprise as one worthy of being extended to other fields where co-operation between council and public, professional as well as lay, is more easily achieved when all concerned start off in possession of the relevant information.

The Study of Delinquency

WE welcome the appearance of the first number of the first volume of the *British Journal of Delinquency*, the official organ of the Institute for the Study and Treatment of Delinquency (Bailliére, Tindall and Cox, annual subscription 27s. 6d.). Its editors, Dr. EDWARD GLOVER, Dr. HERMANN MANNHEIM, and Dr. EMANUEL MILLER, announce on the first page that the primary aim of the journal is to enable students of criminology to keep in touch with recent developments in the various branches of science concerned with the investigation, treatment and prevention of delinquency. The success of the Psychopathic Clinic, founded by the Institute and now under the Ministry of Health, showed the value of co-operation between psychiatrists, physicians, social workers and teachers, and the journal should furnish a valuable source of information and reference. For advocates, magistrates and judges, now that s. 7 of the Criminal Justice Act, 1948, has enabled criminal courts to dismiss charges conditionally on treatment being undergone, the journal will have immense value in assisting them to distinguish cases in which punishment is appropriate from those in which it would be individually and socially harmful. For example, no lawyer can read the detailed account by HEDWIG SCHWARZ of the psycho-analysis of a case of stealing, in the current number of the journal, without re-examining to some extent his views on crime and criminals. This pioneering effort in scientific medico-legal journalism, under an advisory board numbering such distinguished persons as Sir CYRIL BURT, LORD CHORLEY, Professor FORTES, Miss MARGERY FRY and Miss ANNA FREUD, deserves, and will receive, the support of the legal profession.

Institute of International Law

THE eight-day conference of the Institute of International Law recently held at Bath, under the presidency of Sir ARNOLD MCNAIR, assisted by Senator HENRI ROLIN, Belgium, and Judge BAGGE, Sweden, adopted resolutions on the right of States to grant asylum to foreign refugees upon their territory or diplomatic or consular premises or ships of war, and on other problems connected with foreign refugees, and on the criminal jurisdiction exercisable by States in the case of persons who have already been prosecuted in a foreign country, whether convicted or acquitted, and the circumstances in which that jurisdiction should be exercised. It also prepared a draft convention for according some international status to unofficial non-profit-making international organisations concerned with scientific, cultural, economic, and other purposes. The conference also considered the consequences of a difference in the nationalities of husband and wife upon the legal effects of marriage and divorce; the interpretation of treaties; the extent of the domestic jurisdiction of States, as defined in the Charter of the United Nations; the effect of territorial changes upon the rights of private individuals; and the international effects of the nationalisation of the property of aliens.

Students and the Call-up

THE Ministry of Education announced on 11th September that students who plan to enter universities and technical colleges in the autumn of 1952 will be unable to complete the two years' national service recently proposed unless they join the armed forces forthwith. It has been agreed with the service departments that these students may expect to be released in time to take up their studies provided they begin their full-time national service not later than 11th October next, or, exceptionally, 19th October. All students concerned should get into touch with a local office of the Ministry of Labour and National Service immediately and complete an application form for early call-up. The form must be countersigned by the headmaster or by the boy's parent or guardian. Full details of the new arrangements are given in a memorandum to headmasters issued jointly by the Ministry of Education, the Ministry of Labour and National Service, and the Scottish Education Department.

THE AWARD OF COMPENSATION IN CRIMINAL PROCEEDINGS

THIS article will review the statutory provisions which enable a criminal court to award compensation or restitution to the complainant and other aggrieved persons. The advantages of getting both the criminal charge and the question of compensation dealt with at the same time are found in the saving of the time and trouble of further civil proceedings and in the powers which the criminal courts have in most cases as to the recovery of sums ordered to be paid by them. Means to pay and refusal to pay need not be proved with the same strictness as in the county court, and the threat of imprisonment in default of payment often does produce the money in circumstances where a committal order in the county court would be difficult to secure. On the other hand, the practitioner, in deciding whether to proceed in the magistrates' court or the county court, must bear in mind that there is no power, in assault cases before magistrates, to award compensation to the party aggrieved, save under s. 11 of the Criminal Justice Act, 1948 (*infra*), and the magistrates may regard the case as too serious to deal with by way of probation or absolute or conditional discharge. Their adjudication, however, on the assault will be a bar to civil proceedings against the same defendant (provided he pays the fine and costs or goes to prison, if convicted—see the Offences against the Person Act, 1861, s. 45), though it will not bar proceedings against the defendant's master (*Dyer* v. *Munday* [1895] 1 Q.B. 742). It was held in *Hartley* v. *Hindmarsh* (1866), L.R. 1 C.P. 553, that, where the magistrate merely bound over the defendant to keep the peace and did not adjudicate upon the assault, s. 45 was not a bar to further proceedings. This case was doubted, however, in *R.* v. *Miles* (1890), 24 Q.B.D. 423, and the Criminal Justice Act, 1925, s. 39, has now added a specific power to bind over for assault. The practitioner must also remember in certain cases under the Malicious Damage Act, 1861, the Larceny Act, 1861, and the Public Stores Act, 1875, that a summary conviction under those Acts may bar further civil proceedings (see *infra*). Also, while a civil court must generally award to a successful plaintiff the full amount of the loss proved, a criminal court is not bound to award compensation at all, and, if it does, need not award the full amount of the loss proved (though this will not bar further civil proceedings for the unawarded balance, save in cases to which certain provisions of the three cited Acts of 1861 apply). The rule that civil proceedings must not be taken for felony till it has been prosecuted or a reasonable excuse shown for not prosecuting should also be remembered (see Halsbury, vol. 32, p. 193, for this rule and its qualifications).

The Acts which permit the award of compensation in criminal proceedings include the following:—

(1) The Criminal Justice Act, 1948, s. 11, permits a court, when making a probation order or order of absolute or conditional discharge under s. 7, to order the defendant to pay such damages for injury or compensation for loss as it thinks reasonable. This power may be exercised either on conviction on indictment or on summary conviction, but in the latter case the damages and compensation together must not exceed £100. An order cannot be made under this section requiring the payment of money which was not the subject of the prosecution (*R.* v. *Peel* [1943] 2 All E.R. 99; 87 SOL. J. 266, where a defendant was convicted of embezzling £5: at the trial it was stated that the total amount embezzled by him was £70, but no indictment was preferred in respect of the other £65, nor were any other offences taken into consideration: it was held that a probation order requiring him to repay £70 by instalments was not a proper order to make, as the court was, in effect, turning itself into a debt-collecting society). Any person who has suffered loss may be compensated under s. 11 and not only the loser, victim of the assault, etc.

(2) The Forfeiture Act, 1870, s. 4, provides that a court convicting any person of felony may, on the application of any person aggrieved and immediately after the conviction, award a sum not exceeding £100 by way of satisfaction or compensation for any loss of property suffered by the applicant through or by means of the felony. This section applies to convictions on indictment and summarily and to any person suffering as a result of the felony, e.g., a *bona fide* purchaser of stolen goods who has to restore them to the owner. It is limited, on the other hand, to compensating the loss of property and to felonies. Most thefts (other than of certain animals and growing things), embezzlement and receiving stolen property are felonies, but fraudulent conversion, obtaining by false pretences, assaults and most forms of wilful damage are not. Compensation alone, without any penalty, should not be awarded under s. 4 (*R.* v. *Lovett* (1870), 23 L.T. 95).

(3) The Criminal Law Amendment Act, 1867, s. 9, provides that, where any prisoner shall be convicted summarily of larceny and it appears, on evidence, that he has sold the stolen property to a *bona fide* purchaser and that any moneys have been taken from the prisoner on his apprehension, the magistrates may, on the purchaser's application and on restitution of the stolen property to the prosecutor, order that such moneys (not exceeding the price paid by the purchaser) be delivered to the latter. Section 45 (3) of the Larceny Act, 1916, in like terms, applies to convictions on indictment.

(4) The Larceny Act, 1916, s. 45, also deals with the restitution of property obtained by a felony or misdemeanour mentioned in that Act, and is applied, by s. 27 (3) of the Summary Jurisdiction Act, 1879, to proceedings before magistrates in respect of indictable offences under s. 24 of the Criminal Justice Act, 1925. Section 45 does not apparently apply to offences under the Larceny Act, 1861, but, as all stolen property (being "goods") revests in the owner on conviction of the offender (see the Sale of Goods Act, 1893, s. 24), the loser still has his remedies in the civil courts. The refusal of a criminal court to make an order of restitution under s. 45 does not bar civil proceedings by the loser (*Ex parte Davison* (1896), 60 J.P. 808), save in cases mentioned in (5), *infra*.

(5) The Larceny Act, 1861, ss. 18 (stealing dogs), 21 (stealing certain animals), 23 (killing pigeons), 24 (taking fish), 33 (stealing trees, shrubs, etc.), 34 and 35 (stealing or possessing fences, gates, wood, etc.), and 36 and 37 (stealing fruit and vegetable productions) enable a magistrates' court to award the value of the stolen property to the party aggrieved in addition to any fine (but not in addition to imprisonment), and the money recovered for such value shall be paid to him (s. 106). By s. 109, on a summary conviction by virtue of the Larceny Act, 1861, a defendant who has paid the fine, costs and compensation, or undergone the imprisonment awarded, is "released from all further or other proceedings for the same cause." It is arguable that this provision bars civil proceedings after conviction (provided the penalty has been paid or the defendant imprisoned) by the owner of the property taken or anyone else, though as stolen "goods" will have revested in the owner on conviction,

by virtue of the Sale of Goods Act, such a position is indeed remarkable if the magistrates have not awarded him compensation for loss of the stolen property. Arguments can be put forward on both sides in this matter, so it is suggested that, to be safe, the owner should always (if he cannot get the property from the police) ask the magistrates to award him full compensation in proceedings under the cited sections. Section 109 applies to proceedings under the Public Stores Act, 1875, but the Larceny Act, 1916, contains no like provision in respect of offences under that (1916) Act.

(6) The Criminal Justice Administration Act, 1914, s. 14, enables a magistrates' court, on a charge of wilful damage not exceeding £20 to any real or personal property, whether public or private, to award compensation to the party aggrieved, to be paid by the defendant in addition to any fine or imprisonment inflicted on him. There is no statutory provision to bar further civil proceedings where a defendant has been dealt with under this section. Further, there is no power for a criminal court to award compensation exceeding £20 in amount, save under s. 11 of the Criminal Justice Act, 1948 (see (1), *supra*), or save under the sections of the 1861 Act set out in (7), *infra*, or where the doing of the damage amounts to a felony.

(7) The Malicious Damage Act, 1861, ss. 22 (damaging trees, etc., within monetary limits), 23 and 24 (destroying fruit and vegetable productions), 25 (destroying fences, etc.) and 41 (killing or maiming certain animals) provide for the amount of the injury done to be paid, under s. 64, to the party aggrieved. Section 67 provides that a defendant, on payment of the fine, costs and compensation or on undergoing the imprisonment awarded, shall be released from all further or other proceedings for the same cause. If the amount of damage does not exceed £20, obviously the best course is to proceed under s. 14 of the 1914 Act, as mentioned in (6), *supra*.

The provisions of s. 45 of the Offences against the Person Act differ from s. 67 of the Malicious Damage Act and s. 109 of the Larceny Act, 1861, in that further proceedings against the defendant for an assault are barred either by his acquittal or by his conviction (plus payment of the amount awarded or imprisonment). Further civil proceedings in respect of the relevant offences of damage or larceny under the other two Acts of 1861 are not barred by the defendant's acquittal, but (as against him) only by his undergoing imprisonment or payment of the amount awarded.

(8) The Children and Young Persons Act, 1933, s. 55, empowers a criminal court, on conviction of a juvenile, to order that the fine, damages and costs imposed be paid by his parent or guardian. This is a useful provision to remember where damage has been suffered as a result of an offence by a juvenile, since the parent may (if the court thinks fit) be thus made to compensate the loser although the parent might have a defence in civil proceedings (see Halsbury, vol. 17, p. 619, note (s)). The court can, of course, award compensation only where a statute authorises it, e.g., on conviction for felony.

(9) The Protection of Animals Act, 1911, s. 4, provides that if any person shall by cruelty do any damage or injury to any animal, person or property, he may be ordered on conviction to pay a sum not exceeding £10 as compensation.

(10) The Pawnbrokers Act, 1872, ss. 30, 33 and 46, contains provisions as to compensation in certain cases of unlawful pawning.

(11) The Police (Property) Act, 1897, s. 1, while not dealing with compensation, should be borne in mind, as it enables application to be made to a magistrate's court by the claimant of any property which has come into the possession of the police in connection with any criminal charge. The court may order the delivery of the property to any person appearing to be the owner.

Let us now consider a set of facts which may confront a solicitor whose client has issued a summons for assault without consulting him first as to the desirability of proceeding civilly. The defendant has struck the complainant several blows in the face, knocking him over and causing blood to flow on the complainant's coat, staining it badly; also, in falling, the complainant upset a table holding crockery belonging to him (complainant), which has been broken in consequence. If the complainant desires compensation for pain and suffering and loss of wages through inability to work because of the assault, it can be awarded only if the magistrates put the defendant on probation or give him an absolute or conditional discharge (Criminal Justice Act, 1948, s. 11). As they may well treat such an assault as too serious for that course, the complainant would be well advised to withdraw the summons and start afresh in the county court; withdrawal does not amount to dismissal nor entitle the defendant to set up the defence of *res judicata* (*Land* v. *Land* [1949] 2 All E.R. 218; 93 SOL. J. 540). If the complainant, however, wishes to claim compensation only for his damaged coat and broken crockery, he should be advised to issue a further summons for wilful damage under s. 14 of the Criminal Justice Administration Act, 1914 (see (6), *supra*). The facts, as stated, show that, though the defendant probably had no desire to upset the table, he was reckless whether he did damage it or not in knocking back the complainant against it and this would amount to wilful damage (*R.* v. *Pembliton* (1874), L.R. 2 C.C.R. 119; *Re Borrowes* [1900] 2 Ir. R. 593, cited in Archbold, 32nd ed., p. 882). As to the blood on the coat, everyone knows that several blows in the face will probably draw blood and that such blood will flow downwards and stain anything on which it falls—in other words, the natural consequence of the blows is damage to the coat. The doctrine of a man intending the natural consequences of his acts was discussed by Denning, L.J., in *Hosegood* v. *Hosegood* (1950), 66 T.L.R. (Pt. 1) 735, where he observed that it is an inference which the court, on the facts, may draw, but is not obliged to draw. It is arguable, therefore, that in the assault case the ferocity of the defendant's acts would entitle the magistrates to draw that inference. Alternatively, it could be argued that he was reckless whether his blows did damage the coat. It must be remembered, however, that "wilful" damage must be proved, and the fact that damage is inflicted in the course of an illegal act does not alone make it "wilful," e.g., a car thief who negligently collides with a lamp post does not wilfully damage either car or lamp post.

Summing up, the practitioner should remember that a criminal court has a general power of awarding compensation—

(1) on conviction for felony, in respect of the loss of property;

(2) on making an order for absolute or conditional discharge or a probation order; and

(3) on convicting of wilful damage, not exceeding £20, under the Criminal Justice Administration Act, 1914.

G. S. W.

Mr. M. L. Hall, solicitor, of Stockport, was married on 7th September to Mrs. Hilda Jones, of Stockport.

Mr. G. W. F. Archer, solicitor, of Oxford, was married recently to Miss Mary Deeming, of Headington.

Taxation

MAINTENANCE ORDERS AND TAX

THE question of income tax in relation to maintenance orders made following a separation or divorce is one of importance, and sometimes of difficulty, to solicitors concerned in matrimonial matters. The general principles are, however, clear.

If a husband is ordered to pay annual sums for the maintenance of his wife, such sums are proper deductions in computing his total income for tax purposes, and form part of the total income of the wife. But in assessment of the husband to income tax, the sums are not as a rule deductible, on account of the prohibition contained in General Rule 19 of the Income Tax Act, 1918. The result is that the husband pays to the Revenue at least as much income tax as he paid before the maintenance order. In some cases it may be that he pays more, for if his income, as reduced by the maintenance payments to the wife, is now insufficient to support all the personal reliefs to which he is entitled, he will lose the balance of his reliefs. It might be thought wrong that the husband, who now has a smaller spending income, should have to pay the same or a greater amount of tax, but actually he has no ground for complaint, as he does not bear the whole of the tax which he has paid. He recoups himself by deducting tax at the standard rate from the annual payments which he makes to his wife.

From the wife's point of view, tax has been suffered at the standard rate on the payments which she receives from her husband, and if she is entitled to personal reliefs which have not been allowed against any other income of hers, she can claim repayment of the whole or part of the tax deducted by the husband. Tax liability thus falls fairly as between husband and wife.

The machinery of collection is different in the case of "small maintenance orders," though the ultimate result as between the parties is the same. "Small maintenance orders" are those made by any court, High Court, magistrates' court or otherwise, for the payment of sums not exceeding £2 for the maintenance of a woman and £1 for the maintenance of a child under sixteen (Finance Act, 1944, s. 25). In relation to orders made by a court of summary jurisdiction the figures are increased to £5 for the maintenance of a woman and £1 10s. for the maintenance of a child up to the age of twenty-one (Married Women (Maintenance) Act, 1949, s. 3). All such small maintenance payments are payable in full without deduction of tax. Since there is no question, therefore, of the husband being able to recoup himself by deducting tax from the payment, he is assessed to tax on his own income computed after deducting the small maintenance payments; this puts him ultimately in the same position as a man who has been able to deduct tax. The wife receives payment in full, and if she is liable to tax she is assessed thereon, and she too arrives at the same ultimate position.

If a husband is ordered to make payments in respect of the maintenance or education of children, it is necessary to examine the terms of the order closely in order to ascertain whose income the payments become. The normal form of order, if the wife is given custody of the children, is that the husband is to pay certain sums to the wife for the maintenance and education of the children. An order in that form makes the income that of the wife and not of the children. The payments swell the income of the wife to enable her to meet her obligations to maintain the children (*Stevens* v. *Tirard* [1940] 1 K.B. 204). Payments for the maintenance of the children which are income of the wife would support any claim to income tax reliefs which the wife may be unable to obtain against the rest of her income, and they would form part of her total income for sur-tax purposes.

It is, however, possible, according to a recent decision of the court, for an order to create a trust in favour of the children, in which case the payments become income of the children and not of the wife (see *Yates* v. *Starkey* [1950] Ch. D., 18th July). If the income is that of the children by reason of a trust having been created in their favour, a curious result follows, according to the decision in *Yates* v. *Starkey*. Section 21 of the Finance Act, 1936, comes into operation. That section was primarily intended to prevent a parent from reducing his total income for sur-tax purposes by making a settlement in favour of his infant children, and then utilising the income arising thereunder for their maintenance and education, thus relieving himself of a burden which he would otherwise have had to bear out of his own income which had suffered sur-tax. The section accordingly provides that income arising under a settlement made by a parent which is paid to or applied for the benefit of an infant unmarried child of the settlor is to be treated as the settlor's income. Surprisingly, that section has now been held to apply to an order of the court whereby a husband is compelled to make payments which are to be held in trust for the children. The result is that such payments are not to be regarded as reducing the husband's total income either for income tax or sur-tax purposes, nor as constituting income of the children. This consequence will usually be disadvantageous to the husband and the children. If the husband is a sur-tax payer, his liability will not be reduced by the payments, and it will not be possible to prefer repayment claims on behalf of the children based on their personal title to income tax reliefs. In some cases, however, it will be favourable to the husband, for if his total income, as reduced by the payments in trust for the children, is insufficient to support his personal reliefs, he will find his right to include those payments as part of his income of assistance to him, and the parents will not be deprived of the right to claim child allowances in the assessment of their income to income tax, as would have been the case had the income of the children exceeded £60 per annum (Finance Act, 1920, s. 21, as amended by Finance Act, 1947, s. 15 (3)).

The effect of a divorce or separation on claims to allowances must now be examined. In the year in which the separation or divorce takes place, the husband is entitled to claim a married man's personal allowance of £180, but thereafter his claim will be to the single person's personal allowance of £110. The wife will be able to claim a single person's personal allowance of £110 both in the year of the divorce or separation and thereafter. The child allowance can be claimed by either parent as may be agreed between them, but failing agreement the allowance will be divided between them in proportion to the amount or value of the provision made by them respectively for the child's maintenance or education (Finance Act, 1940, s. 24). If the wife has the custody of the children, this will usually mean that it is she who is entitled to claim the allowances, because it is provided that payments made by the husband which are proper deductions in computing his total income—such as payments to the wife for the maintenance of the children—are not to count as provision made.

C. N. B.

Costs

REGISTERED LAND

WE are reminded that when dealing with conveyancing costs we did not deal specifically with those in relation to registered land, and we propose examining the regulations with regard to this type of conveyancing business now.

In the first place, it may be as well to consider precisely what is meant by the term "registered land." Briefly, provision was made under the Land Registration Act, 1925, for the title deeds of land to be lodged at H.M. Land Registry where, in consideration for a fee, the title is examined and is registered under one of four headings, namely, with an absolute title, a good leasehold title, a possessory title or a qualified title, and a certificate, called a land certificate, is issued.

Land which is registered with an absolute title means land in respect of which there is no defect on the title and all future dealings in the land are effected merely by a transfer in the Land Registry, and the issue of a fresh land certificate.

Where land is registered with a qualified title it means that there is a defect in the title and any purchaser must take the title subject to that defect. However, the proprietor of land with a qualified title which has been on the register for fifteen years, in the case of freeholds, is entitled to have his qualified title converted into an absolute title.

A possessory title merely guarantees the title subsequent to the first registration, whilst a good leasehold title means that the title of the lessor is guaranteed, but no account is taken of the interest in reversion.

Provision for solicitors' remuneration in respect of dealings in registered land is made by the Solicitors' Remuneration (Registered Land) Order, 1925, and para. 1 (*c*) of the order provides that for the first registration of freehold or leasehold land item remuneration shall apply. Now it will be remembered that the General Order, 1882, provides a basis of remuneration in respect of conveyancing matters and a scale is provided by Sched. I of the order for remuneration in respect of completed transactions relating to sales, purchases and mortgages, whilst para. 2 (*c*) of the order states that in respect of all other conveyancing matters not provided for by Sched. I, the item remuneration provided by Sched. II shall apply. It follows, therefore, that the item remuneration to which reference is made in para. 1 (*c*) of the Registered Land Order, 1925, must mean item remuneration as provided by Sched. II of the order of 1882.

On a first registration of land all that it is necessary to do is to lodge the deeds in the Land Registry with a copy of the plan and a copy of the conveyance, and the solicitor's charges for this work will vary, of course, with the length of the documents to be copied, and the number and intricacy of the questions raised by the Land Registry officials. In a simple and straightforward case, however, the solicitor's fee on a first registration will not exceed 4 or 5 guineas.

So far as future dealings in registered land are concerned the transfer will be effected, as we have said, merely by an entry in the register; and, as regards land registered with an absolute title, there will be no further investigation of title: all that the purchaser's solicitor will have to do is to inspect the register to ensure that there are no charges, restrictions or other entries thereon.

Since, therefore, the solicitor has no title to investigate or deduce and no lengthy conveyance to draw or peruse, his fees, as fixed by the Registered Land Order, 1925, are considerably less than the fees fixed by the General Order of 1882 in respect of unregistered land, and it will be found that they work out at one-half or slightly less than one-half of the scale charges for unregistered land.

The scale remuneration for completed sales, purchases and mortgages of registered land and transfers thereof set out in the schedule to the order is as follows: For the first £1,000 of the price or loan, 22s. 6d. per £100; for the second and third £1,000, 15s. per £100; for the fourth and fifth £1,000, 7s. 6d. per £100; for the sixth to the tenth £1,000, inclusive, 6s. per £100; for the eleventh £1,000 and up to £50,000, 3s. per £100; and for the remainder up to £100,000, 2s. per £100. Transactions for more than £100,000 will be charged as for £100,000. Fractions of £100 under £50 are reckoned as £50, whilst fractions of £100 over £50 will be reckoned as £100. The minimum charge is £2 5s. The above scale includes the 50 per cent. increase authorised by the combined effect of the Registered Land Orders, 1925 and 1944.

Now this scale applies only to completed transfers on sale or purchase of registered land, or completed charges or mortgages thereof where the land is registered with an absolute or good leasehold title, or where it is registered with a possessory or qualified title and no title outside the register is investigated (see para. 1 (*d*) of the order). In the case of land registered with a possessory or qualified title, where the solicitor investigates the title off the register, then his charges will be made up on an item basis in accordance with Sched. II of the General Order, 1882.

It will thus be seen that it is not in respect of all transactions in connection with registered land that the solicitor is remunerated according to the scale in the 1925 order, and, indeed, cases may arise where the solicitor's remuneration is made up of a combination of fees from the scales under both the General Order, 1882, and the Registered Land Order, 1925. Thus, in respect of negotiating a sale of property in registered land or negotiating a mortgage thereof, the solicitor's negotiating fee is to be calculated according to the scale under the 1882 order; whilst the fee for the transfer of the title will be calculated according to the scale in the 1925 order. Again, where registered land is sold by auction and the solicitor is entitled to the conducting fee, then this fee also will be calculated according to the order of 1882. The reason, of course, is clear. The work involved in negotiating or in conducting an auction is no less because the land is registered than if it were unregistered.

It will be remembered that under r. 3 of the rules applicable to Sched. I, Pt. 1, of the General Order, 1882, where the solicitor acts for both the mortgagor and mortgagee he is entitled to the full scale fee for acting as the mortgagee's solicitor, and one half of the scale fee for acting as the mortgagor's solicitor. There is a counterpart of this rule in the Registered Land Order, 1925, for para. 1 (*k*) provides that when a solicitor is concerned for the proprietor of land and for a person taking a charge thereon, he is entitled to the scale fee for acting as solicitor for the person taking the charge and one half of the scale fee for acting for the proprietor of the land.

Paragraph 1 (*k*) also provides for the case which, in respect of unregistered land, is covered by r. 6 of the rules applicable to Sched. I, Pt. 1, of the General Order, 1882. This rule, it will be remembered, provides that where a conveyance and mortgage of the same property are completed at the same time by the same solicitor he is entitled to one half of the mortgagee's solicitor's scale fee plus the full scale fee for acting for the purchaser. Paragraph 1 (*k*), *supra*, has the

same effect in respect of a similar transaction relating to registered land.

In the same way that a solicitor may elect to be remunerated on an item basis before undertaking any transaction in relation to unregistered land, he may make a similar election in respect of transactions affecting registered land. The notice of election must be in writing communicated to the client before the business is undertaken.

The Registered Land Order, 1925, does not, of course, affect the remuneration in respect of short leases of registered land at a rack-rent and such remuneration is regulated by the scale set out under Sched. I, Pt. 2, of the General Order, 1882, whether the property is registered or unregistered.

If the solicitor is acting for several parties having distinct interests proper to be separately represented, then he will be entitled to charge each party after the first a fee of 3 guineas. This is the fee prescribed by the order (see para. 1 (*l*)), and whether or not this fee is still applicable, or whether it is subject to a percentage increase, is open to conjecture. A reference to the Registered Land Order, 1925, discloses the fact that the *scale* of remuneration in respect of registered land is contained in a schedule to the order. The authority for increasing the *scale* remuneration by 33⅓ per cent. is contained in para. 4 of the schedule, which limits the increase to the "remuneration which is prescribed under this scale." It seems to follow from this that the 33⅓ per cent. increase does not apply to the 3 guineas authorised by para. 1 (*l*), since that paragraph does not form part of the scale. If one turns to the Registered Land Order, 1944, however, one finds that authority is there given for increasing "the remuneration of a solicitor in conveyancing and other non-contentious business in matters affected by the Solicitors' Remuneration (Registered Land) Order, 1925" by 12½ per cent. It would thus appear that the above item of 3 guineas may be increased by 12½ per cent. The popular view is, indeed, that by reason of the manner in which the 1925 order is drafted the 3 guineas is not subject to an increase of 50 per cent., although it seems doubtful whether this was the intention.

The scale remuneration prescribed by the order of 1925 includes all attendances at and correspondence with the Registry incidental to the transaction as well as the preparation or perusal, as the case may be, of the contract and all necessary copying. It does not include necessary and proper disbursements which may be charged in addition. Stationers' charges for copying, including the charges for copying plans, are not a disbursement for this purpose, and this expense must be deemed to be covered by the scale charge.

J. L. R. R.

A Conveyancer's Diary

BEQUESTS TO NATIONALISED HOSPITALS AGAIN—III

THERE are two matters to which I particularly wish to draw attention in connection with the judgment of Roxburgh, J., in *Re Morgan's Will Trusts* [1950] 1 All E.R. 1097; 94 SOL. J. 368, a summary of which was given in these columns last week.

In the first place, although no cases are referred to in the judgment and there is no note of the arguments of counsel in any report of the case which has so far appeared, I have been told that the argument for the next of kin, who would have taken the subject-matter of the gift to the hospital in the event of a lapse being declared, was very fully developed, and in particular much stress was laid on the decision in *Re Rymer* [1895] 1 Ch. 19. That was a case of a gift to the rector for the time being of St. Thomas's Seminary for the education of priests in the diocese of Westminster, and the seminary in question was closed down during the interval between the dates, respectively, of the will and the testator's death, and removed to another locality in another diocese. Chitty, J., construed the gift as a gift to a particular, localised institution for the purposes of that institution, and he applied the principle that where there is a bequest to a particular charitable institution existing at the date of the will, and that institution has ceased to exist at the date of the death, the gift fails and lapses in exactly the same way as a gift to an individual who dies before the date of the testator's death. When, therefore, Roxburgh, J., summarised the argument of counsel for the next of kin as, in effect, a submission that, in view of the operation of the Act on the hospital's property, the hospital had ceased to exist, this "cesser of existence" must be understood to refer not to the destruction and disappearance of the physical assets of the hospital, but to its existence as the institution which the testatrix had in mind when she made her will.

The decision in *Re Morgan, supra*, must be accepted as rejecting this view, and, although the case is not referred to in the judgment, as in effect an application to the particular facts of the principle for which *Re Faraker* [1912] 2 Ch. 488 is usually cited. In that case there was a gift by will to "Mrs. Baily's Charity Rotherhithe." One Hannah Bayly had founded a charity in 1756 for the benefit of poor widows in St. Mary's Parish, Rotherhithe, but in the interval between the date of the will and the date of the death the Charity Commissioners had sealed a scheme for this and certain other charities, whereby their endowments were consolidated and trusts were declared for the poor of Rotherhithe. It was held that the charity which the testatrix had in mind had not been destroyed by the scheme, since it was the jurisdiction of the Charity Commissioners in making schemes to uphold and encourage charities, not to end them; and there could be no question of an application of the gift *cy-près* since there had been no failure of poor widows in Rotherhithe.

Applying this *ratio decidendi* to the facts in *Re Morgan, supra*, it may be said that in the latter case there had been no failure of the work which, at the date of the will, was being carried on on the premises of the hospital at Liskeard; it will be recalled that the analysis of the gift "for the benefit of the Liskeard Cottage Hospital" which the judge accepted was that it was a gift for such work, or, perhaps, a gift in supplementation of the funds available for carrying on that work (another way of putting in a few words the principle acted on in *Re Faraker, supra*, is to say that a gift was intended as an augmentation of the funds held by trustees for a certain institution—see, e.g., *Re Lucas* [1948] Ch. 424).

In discussing the possibilities in connection with such a gift as that in *Re Morgan, supra* (i.e., a gift by will dated before the appointed day of a testator dying after that day in favour of a nationalised hospital) in an earlier article in this Diary (see 93 SOL. J., at p. 787) I pointed out that before the decision in *Re Faraker, supra*, could be brought in to assist in the solution of the problem it had to be demonstrated that the institution which it was sought to benefit was a charity; and I posed the question whether a publicly owned and publicly financed institution, such as a nationalised hospital,

could still be regarded as a charity. This question has now been answered. In *Re Frere* [1950] 2 All E.R. 513, at p. 516, Wynn Parry, J., said: "The fact that the hospital is still to be regarded as a charity seems to me implicit in the reasoning of Roxburgh, J., in *Re Morgan's Will Trusts*, and, further, it appears to me that in *Re Dean's Will Trusts* [1950] 1 All E.R. 882, Harman, J., has, in effect, held that a hospital does not cease to be a charity merely because of the coming into effect of the National Health Service Act."

The second point in connection with *Re Morgan, supra*, is the question—the extremely important question—whether the decision is an authority to be followed in the case of any legacy to a nationalised hospital contained in a will dated before the appointed day of a testator who dies after the appointed day, or whether it is a decision only on a gift in the form in which the particular gift in the case was drawn. That form was not of a gift, simply, "to" a hospital, but "for the benefit of" a hospital. And I think there is a difference here between the two forms, although how much weight should be given to the difference it is not easy to say.

In the forefront of the analysis of the form of gift in *Re Morgan, supra*, Roxburgh, J., pointed out that it was "not to anybody; it is for the benefit of the Liskeard Cottage Hospital," and he rejected the interpretation which it was sought to put on the language of the gift whereby the gift was to be construed as a gift to the trustees for the time being of the hospital to be held by them as an accretion to its general funds. It is dangerous to try and read something into a passage from a judgment which is not apparent on its face, but it seems to me that the rejection of this analysis of the gift flows inevitably from the construction of the gift as being a gift "not to anybody," for this reason: a gift to the —— Hospital before the appointed day was a gift, if the hospital was not incorporated, to the trustees for the —— Hospital: in the case of an unincorporated institution, the trustees were the only persons, in the absence of some specific authority to the contrary, who could take the property which made up the gift. Now as regards gifts made since the appointed day, s. 59 of the Act provides that specific authority to enable the successors to the trustees in the management of the hospital, i.e., the hospital management committee, to accept property, but if, as a matter of construction, a gift of the kind we are now considering is a gift to certain persons, the fact that other persons are enabled by statute to accept such gifts cannot colour the construction to be put on the gift itself; and if the donees have gone (as the trustees of unincorporated nationalised hospitals have gone) how is the situation different from the lapse of a legacy to an individual resulting from the disappearance before the testator's death of that individual?

The question is, at the very least, an open one, as I have said before, and my advice to those who have before them a simple bequest to a named nationalised hospital contained in a will, dated before the 5th July, 1948, of a testator who died after that date, is not to jump to the conclusion that *Re Morgan* has settled the question whether such a bequest is subject to lapse or not.

There is no space to touch on the less important, but still interesting, decision in *Re Frere*, mentioned above, and I will return to that, and one or two other cases on this subject, next week.

"A B C"

Landlord and Tenant Notebook

CENTRAL HEATING SYSTEM MAINTAINED BY LANDLORD

THE case of *Frensham (George), Ltd.* v. *Shorn (M.) & Sons, Ltd., and Another* (1950), 94 SOL. J. 553, did not, according to Finnemore, J. (who tried it), turn upon the relationship of landlord and tenant; but the responsibility which the second defendants were held to bear towards the plaintiffs does seem to be closely connected with the lease granted by them to the plaintiffs. The claim was for damage occasioned by the bursting of a radiator and consequent flooding of part of a building, and the important features of the situation were as follows.

The building, of which one floor was let to the plaintiffs, and one above it to the first defendants, belonged to the second defendants, who retained a measure of control over the premises, including complete control of the heating system (exercised by a professional), and tenants were prohibited from interfering with that system. During a week-end in February, 1948, the boiler was allowed to go out, a radiator on the floor let to the first defendants burst, and the damage to the plaintiffs' property resulted. The claim against the first defendants was based on the fact that windows on their floor were unglazed, some cardboard and sacking providing inadequate protection against the cold; but Finnemore, J., held that this did not make them responsible for the damage on the ground of negligence (nuisance appears not to have been pleaded). But it was on the ground of negligence that the learned judge found against the second defendants; the lease between them and the plaintiffs made no reference to the heating system.

If I may be excused citing commonplaces, in order to succeed in an action for negligence a plaintiff has to prove three things: a duty towards himself, breach of that duty, and damage resulting from that breach. The duty itself is often the most difficult thing to establish; in this case Finnemore, J., referred it to control plus proximity. The second defendants' control of the heating system, he held, gave rise to a duty—a plain duty to everyone on their premises, and probably to those on the next-door premises if they were affected—to act reasonably and properly and without negligence with regard to the heating system.

In so holding the learned judge might be said to be applying the principle applied in *Wilchick* v. *Marks and Silverstone* [1934] 2 K.B. 56, in which a landlord who had merely reserved a right to repair was held liable to a passer-by injured by the fall of a defective shutter. And in that case Goddard, J., invoked a passage in the judgment of Abbott, C.J., in *Laugher* v. *Pointer* (1826), 5 B. & C. 547: "I have the control and management of all that belongs to my land or my house; it is my fault if I do not so exercise my authority as to prevent injury to another," which might be said to echo the Roman law's *sic utere tuo ut alienum non lædas*. In the same case Litteldale, J., expressed the position in this way: "Where a man is in possession of fixed property he must take care that his property is so used and managed that other persons are not injured." This, perhaps, comes closer to the issue in the recent case than did *Wilchick* v. *Marks*, which was decided on the ground of nuisance, not negligence.

Having so defined the duty, Finnemore, J., proceeded to hold that it was "either not to let out the boiler fire or, if it had been let out and then the outside temperature dropped, to relight it, or, at the least, to warn tenants who might be affected that the boiler fire would not be maintained over the week-end, so that the tenants could perhaps take other precautions." This is, of course, indeed the position if they omitted to do what a prudent and reasonable man would have done; negligence is judged by the standard of prudence of an ordinary reasonable man (*Vaughan* v. *Menlove* (1837), 3 Bing. N.C. 468). The finding does appear to go beyond what one would expect, making the position almost analagous to that in which withdrawal of support is complained of by a person entitled to such.

It may be that when the plaintiffs took the lease they were aware of the amenities afforded by the heating system. But *R.* v. *Croydon and District Rent Tribunal, ex parte Langford Property Co.* (1947), 91 SOL. J. 435, illustrated the weakness of the position of a tenant who assumes that, because when he is shown over the premises before taking them a central-heating and hot-water supply system is working, this system will continue to work during the term though not referred to in the agreement. It was held in that case that a Furnished Houses Rent Tribunal had no right to treat the contract as one providing for services unless and until it was rectified by a court having jurisdiction to rectify it.

Consequently one may wonder why the defendants in the recent case should be in a worse position contractually through letting the fire go out and neither relighting it nor warning their tenants than they would have been in if they had never lit it; but, be that as it may, I would suggest that in the circumstances they might have been held liable to the plaintiffs under the lease, assuming that that instrument did not exclude or suitably (from their point of view) qualify a covenant for quiet enjoyment.

It was at one time thought that that covenant imposed a duty not actively to interfere only, omissions being outside its scope; but this view was disposed of by *Booth* v. *Thomas* [1926] 1 Ch. 397 (C.A.), when the famous founder of the Salvation Army brought an action for damage done to a meeting hall as the result of the bursting of a culvert on adjoining land, the hall being held under a lease granted by the predecessors in title of the defendant owners of that land. It is true that a great deal was said about proximity plus control in that case, and at first instance ([1926] 1 Ch. 109) Russell, J., was prepared to hold that the omission to keep the culvert in a fit condition involved the omission of a duty to an adjoining landowner. But the learned judge held that while it was true that in the authorities on the covenant for quiet enjoyment cited the word "act" nearly always occurred —e.g., in *Sanderson* v. *Berwick-on-Tweed Corporation* (1884), 13 Q.B.D. 547 (C.A.), Fry, L.J., said: ". . . where the ordinary and lawful employment of the demised land is substantially interfered with by the acts of the lessor, or those lawfully claiming under him, the covenant appears to us to have been broken"—there were *dicta* in other cases to the effect that an omission might work a breach; and the Court of Appeal accepted this view. "There seems no logical or other reason for putting an act of omission into a different category from that of an act of commission," said Pollock, M.R.; and if the second defendants in the recent case are, as I have suggested, wishing they had never started the boiler fire, it may or may not be some consolation that Pollock, M.R., also said: "The duty on the part of the defendant would be to repair if he had put this culvert upon his land, or was responsible for the culvert which had been put upon his land, for the purpose of carrying the water past the site of the hall leased to the plaintiff." I submit that an analogy might well be drawn between the facts of that case and those of *Frensham (George), Ltd.* v. *Shorn (M.) & Sons, Ltd.*

It would, no doubt, be argued that the analogy was false because effecting occasional necessary repairs to a culvert when out of order is not comparable to the maintenance of a building at an artificial temperature; in that case the plaintiffs might perhaps fall back on what may be called the tenant's last hope, an allegation of derogation from grant. In *Booth* v. *Thomas* the claim included such an allegation, but Russell, J., held that breach of covenant for quiet enjoyment and derogation from grant stood or fell together. That may have been so in that case, but the ruling was not meant to be of general application. A derogation from grant is a violation of rights conferred with an estate rather than of the terms of a contract. It is true that here again most, if not all, of the examples to be found in recorded cases show positive acts; but Pollock, M.R.'s reasoning in *Booth* v. *Thomas, supra*, would appear to be applicable, and there is no logical or other reason why an omission to light or relight a fire, or warn tenants, should not amount to derogation by a grantor who has let part of a building heated by a heating system exclusively controlled by himself. Demolition of upper parts of a building has been held to be derogation from grant when it occasioned damage to the premises and goods of tenants of lower portions (see *Odell* v. *Cleveland House* (1910), 102 L.T. 602), and I submit that here an analogy might validly be drawn.

R. B.

PRACTICAL CONVEYANCING—XXI

POWERS OF ATTORNEY: DATE OF EXECUTION

A CORRESPONDENT has drawn attention to a difficulty which has arisen in connection with the filing of a power of attorney. Under the Trustee Act, 1925, s. 25, a trustee (which word includes a personal representative) who intends to remain out of the United Kingdom for more than one month may delegate the trusts by power of attorney. Such a power must be filed at the Central Office within ten days after execution (if executed in the United Kingdom). Our correspondent found it necessary to have a power signed by a person who had applied for letters of administration before the grant had been received. Evidence of execution as an escrow was given in the declaration of due execution. The instruments were presented for filing in the Central Office within ten days of the date shown by the declaration to have been the date of the delivery of the deed constituting the power, but after the expiration of ten days from the date of signature of that deed. The solicitor concerned was informed that, according to a ruling of the senior master, the power could not be filed more than ten days after its signature.

With respect, one is bound to feel doubtful about the correctness of this ruling. The rule that a deed takes effect from the date of its delivery is well established. What is more, the revenue authorities apparently agree that for stamp-duty purposes the date of delivery is the date of execution. Consequently, if sufficient evidence of the date of delivery is provided it is difficult to see why the ten-day limit should not run from that date.

One argument in favour of the ruling of the senior master may be that the Judicature Act, 1925, s. 219 (1), and the Trustee Act, 1925, s. 25 (5), both refer to verification of execution by affidavit, etc., and in so doing show an intention

that, for the purposes of those sections, "execution" means signature. The wording of R.S.C., Ord. LXIA, r. 5, may be said to go even further in this direction, but it can scarcely affect the interpretation of the time limit for filing in the Trustee Act, 1925, s. 25 (4). On the other hand, it is relevant to note that most forms of statutory declaration of due execution state that the deed was duly signed, sealed *and delivered*.

If the date of delivery of a deed which was first executed as an escrow is accepted as the test, some difficulties may be experienced. Nevertheless, this seems to be the correct rule. As a grant of administration does not (except for purposes connected with the protection of the estate) relate back to the date of death, it is difficult to see how a power of attorney signed before the making of the grant could be delivered otherwise than as an escrow. In this case, at least, it would appear that the date of "execution" must be the date of delivery.

J. G. S.

HERE AND THERE

TRAVELLER'S GUIDE

RETURNING from foreign parts more than twenty-four hours' railway rattling from the Royal Courts of Justice, one realises the incompleteness of the average phrase-book. I do not mean that few of the works available have such thorough-going foresight of the possible contingencies of travel as a German conversation handbook (c. 1800) I once met which opened with Wagnerian drama: "Gracious God! Our postilion has been struck by lightning." A conversation with such a beginning gets off with a flying start and can reach heights undreamed of by the compiler of the conventional *vade mecum*, his feet firmly planted in the world of taximen, railway porters, hotel keepers and assorted tradesmen. These little works never fail to include a section on health, and an alphabetical list of ailments from abscess to stomach-ache. "I am very ill." "Send for a doctor." "I am feverish." "I cannot sleep." "Please give me a prescription." But it never seems to occur to the publishers that the traveller can ever get into legal difficulties. Yet what is more probable? Even by our own humane customs (the envy of the world) ignorance of the law is no defence, and we doubt very much whether jurists and legislators elsewhere are any more indulgent to the stranger within their gates wandering in a maze of unfamiliar social relationships.

LEGAL SECTION

CONSIDER for a moment what day-to-day occurrences, unhinted at in any phrase book I have ever met, might be jotted down under the simple heading "carriage by land"—carrier as bailee, carrier's liability, conditions of carriage, innkeeper's liability, lost luggage, misconduct of carrier, owner's risk, passenger's duty, restraint of princes, stoppage in transit. Under the headings of contract, tort and criminal law, the approximate equivalents of our simplest legal concepts, though not necessarily attaining the dimensions of a pocket "Halsbury"—if such an object is conceivable—could amount to a very substantial nutshell. How necessary that any work pretending to the most elementary completeness should at least include some such essential sentences as the following: "I am in legal difficulties." "I do not know the nature of the difficulties." "I do not know the law." "I am not a jurist." "The hotel-keeper [porter, policeman, customs officer] is shouting [making threatening gestures] at me." "I do not understand what he is saying." "Send for a solicitor [jurist]." "Are there many different sorts of jurist in this country?" "Which is the best?" "Which is the cheapest?" "Will I also require an advocate?" "Is legal aid free?" "How much does it cost to bring [defend] an action in tort [contract]?" "Will it exhaust my traveller's allowance?" "I have only £50." "Do I therefore qualify as a statutory poor person?" At this point one imagines the traveller may well be obliged to turn to a different section of the work. "I have a headache." "Send me a good physician."

DIFFICULT SITUATIONS

CONSIDER, you returned travellers, how many circumstances, by no means far-fetched or imaginary, might have led you into legal embarrassment or even a prolonged stay in the visited country, enforced and official, unprovided for in your timetable—a misunderstanding with a ticket collector resulting in a charge of attempting to avoid payment of fare; or perhaps some even less predictable complication. "I smiled at the lady." "My smile was one of respectful admiration." "I did not make any improper suggestion." "Is it a criminal offence to smile at a lady?" "Can the magistrate send me to prison?" "Is the trial summary or must I wait for the assizes?" "Are the assizes in two [six, twelve] months?" "Can the magistrate send me to prison for one [two, six, twelve, twenty] years?" "If I am in prison must I pay for my own food?" "I wish I had never seen the lady."

RICHARD ROE.

CORRESPONDENCE

[The views expressed by our correspondents are not necessarily those of THE SOLICITORS' JOURNAL*]*

Speeding in a Built-up Area

Sir,—You report at 94 SOL. J. 585 a decision of the Surrey Sessions Appeal Committee quashing a conviction for exceeding the speed limit in a built-up area because the prosecution had not proved the order directing that the road should be subject to the speed limit. Such an order, however, appears to be necessary only if there are no street lamps in the road or such lamps are more than 200 yards apart; if there are street lamps not more than 200 yards apart along the road, it is deemed to be a road in a built-up area (Road Traffic Act, 1934, s. 1 (1)).

The decision of the Appeals Committee therefore seems to relate only to roads where the lamps are more than 200 yards apart or there are no lamps and it will not affect the majority of speeding prosecutions. I respectfully agree with the committee's decision that the order of the local authority (and *semble* the consent of the Minister of Transport) must be proved in respect of such roads outside the London traffic area. (Within such area it is the order of the Minister himself that must be proved.) The Road Traffic Act, 1934, s. 18 (9) and s. 36, make special provision that pedestrian crossings and traffic signs shall be deemed to be lawfully established and placed, without further proof, but in the absence of such a statutory provision matters of that nature must be proved (*Swift* v. *Barrett* (1940), 104 J.P. 239; 84 SOL. J. 320).

However, even if the police fail to prove the order or the fact that the lamps are less than 200 yards apart, they should be allowed to call evidence to that effect even after they have closed their case (*Duffin* v. *Markham* (1918), 82 J.P. 281). If the magistrates refuse to allow such evidence to be called and dismiss the case, an appeal by the police to the High Court would, on the analogy of *Duffin* v. *Markham*, result in the case being remitted to the magistrates for them to hear it.

I have written at some length to indicate what presumably are the limits of the Appeal Committee's judgment so that motorists, to adapt the railway poster, will know that generally they will still be unable to:

Speed in Surrey
Free from worry.

CAMBRIAN.

NOTES OF CASES

KING'S BENCH DIVISION

CENTRAL LAND BOARD: POWERS OF COMPULSORY PURCHASE

Earl Fitzwilliam's Wentworth Estates Co. *v.* Central Land Board and Another

Birkett, J. 31st July, 1950

Motion.

The applicant company, the owners of a plot of land, refused to part with it to a person wishing to build a house on it except on a lease for 300 years at £20 a year inclusive of the assignment to the prospective lessee of the owners' claim in respect of the plot on the £300,000,000 compensation fund established under the Town and Country Planning Act, 1947. The prospective lessee obtained permission under Pt. III of the Act to build a house on the land, and then applied to the Central Land Board to make for his benefit a compulsory purchase or lease order in respect of the land as the owners were refusing to lease the land to him at its existing use value under the Act. The board had issued a circular explaining the incidence of development charge and setting out three methods of selling land to persons wishing to build on it, each method providing for the payment of development charge to the board and the payment for the land of a price reflecting that payment whether made by the buyer or by the seller. The board, on the prospective lessee's application, wrote to the owners of the plot observing that they were asking a price for it based on the value which the land would have had if the Act of 1947 had not been passed, and inquiring whether they were prepared to follow any, and if so which, of the three courses described in the circular. The owners replied that they would follow none of them. The local authority having intimated that it was desirable that the plot should be immediately available for building, the board made a compulsory purchase order under s. 43 (2) which the Minister of Town and Country Planning confirmed. The owners now moved the court by way of appeal against the confirmation order.

By s. 43 (1) of the Act of 1947, "the Central Land Board may, with the approval of the Minister [of Town and Country Planning], by agreement acquire land for any purpose connected with the performance of their functions under the following provisions of this Act and in particular may so acquire any land for the purpose of disposing of it for development for which permission has been granted under Pt. III of this Act on terms inclusive of any development charge payable under those provisions in respect of that development." By s. 43 (2) the board may be authorised by the Minister, "if he is satisfied that it is expedient in the public interest," to acquire land compulsorily for the purposes of s. 43 (1). Of the "following provisions" referred to in s. 43 (1) the most important are in s. 61, which relates to the ascertainment of development values, and s. 70, which relates to the fixing of development charges. (*Cur. adv. vult.*)

BIRKETT, J., reading his judgment, said that, in his opinion, the board had power under the second part of s. 43 (1) to make the compulsory purchase order in order to assist in the accomplishment of the desired development. He did not think that the board were entitled to exercise the power in question merely for the purpose of enforcing their policy that land should only be sold at a price based on existing use value. As, however, the evidence did not establish that the order was made for that purpose only, it was valid (the Minister having certified its expediency) notwithstanding that the enforcement of that policy might have been one of the motives behind the making of the order. The true construction of s. 43 (1) and of the expression "in particular" there used was that the power given in the second part of the subsection following those words, with regard to the disposing of land for development, was a separate power as expressed, and was not limited to the purposes, such as the ascertainment of development values and the fixing of development charges, for which the powers given in the first part of the subsection were stated to be exercisable. Application dismissed.

APPEARANCES: *H. A. Hill* (*Warren, Murton & Co.*, for *Newman & Bond*, Barnsley); *Sir Hartley Shawcross*, K.C. (*A.-G.*), and *J. P. Ashworth* (*Treasury Solicitor*).

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

PROBATE, DIVORCE AND ADMIRALTY DIVISION

DIVORCE: RAISING OF NEW MATTERS IN MAINTENANCE PROCEEDINGS

Duchesne *v.* Duchesne

Pearce, J. 31st July, 1950

Appeal from a registrar.

The wife was granted a decree *nisi* on her undefended petition in which she alleged desertion and prayed for maintenance. The husband by his solicitors wrote to his wife's solicitors that it was his intention to put forward on the application for maintenance conduct of the parties during the married life as affecting the award. Affidavits were filed by the husband concerning alleged quarrels and unhappiness during the married life, and alleging lack of response to overtures for a reconciliation. On those affidavits the husband applied for the examination and cross-examination of himself on all matters arising out of the application for maintenance. The registrar refused the application, and the husband appealed.

PEARCE, J., said that if, as had been argued on the one hand, all questions of conduct were open to a husband on maintenance proceedings, it would be possible for him to allow his wife to obtain an undefended decree on the ground of desertion and then, when it had been made absolute, to reduce or extinguish his financial liability by proving that the parting was consensual or even that it was his wife who had deserted him. That would offend against the rule of estoppel and would also be against public policy as being a fraud on the court. On the other hand, the effect of excluding from consideration all alleged blameworthy conduct (unless so trivial as to be valueless) would be that a husband, whose wife's conduct was bad but did not actually justify his leaving her, would either have to defend a suit in which he knew he could not succeed or allow his wife to obtain as much maintenance as would have been awarded to a loving and devoted wife. In his view the correct principles were that a respondent was estopped from asserting matters which were inconsistent with the decree and was prohibited for reasons of public policy from asserting matters which would reasonably have been expected, if proved, to provide an effective answer to the petition or to produce a different result at the trial (such as mutual decrees instead of a decree to a petitioner alone, or a discretionary decree instead of a decree as of right). He was not, however, satisfied that that further prohibition extended to matters of which a respondent was ignorant at the time of the trial but of which he might have known "but for his carelessness." Registrars would have to decide on which side of the line the allegations fell, bearing in mind on the one hand the importance of not excluding a just consideration of the party's conduct, and on the other hand the importance of not allowing a respondent to lie in order that a decree might be obtained, and, when it had been made absolute, raise matters which ought to have been before the court at the trial. Here the allegation that the wife did not respond to attempts at reconciliation was inadmissible. Other allegations made should be reduced to greater precision in an affidavit, and, if they should be denied, there must be an examination and cross-examination of the

parties and of witnesses in accordance with r. 52 of the Matrimonial Causes Rules, 1947. Appeal allowed.

APPEARANCES: *R. J. A. Temple* (*Jaques & Co.*, for *David Thomas, Williamson & Co.*, Colwyn Bay); *D. Loudoun* (*Holt, Beever & Kinsey*).

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.

COURT OF ARCHES

ECCLESIASTICAL LAW: FACULTY: LIGHTS ON HOLY TABLE

In re St. Saviour, Walthamstow

Sir Philip Baker-Wilbraham, Dean. 22nd August, 1950

Appeal from a judgment of Mr. Linton Thorp, K.C., Chancellor of the diocese of Chelmsford, refusing to grant a faculty for more than two candlesticks on the holy table of the Church of St. Saviour, Walthamstow.

The church was consecrated in 1874. At the east end there was a mosaic reredos of the Crucifixion, and in front a retable bearing a small cross and six brass candlesticks, which had been there at least since 1886. In 1945 a fire occurred which greatly damaged the church and practically destroyed the east end and its fittings. Restoration having been carried out in January, 1950, the vicar and churchwardens petitioned the Chancellor for a faculty authorising a new altar with a crucifix and six candlesticks, sedilia, clergy and choir stalls and a pulpit. The Chancellor granted the faculty, except as to four of the candlesticks, holding in a reserved judgment that the use of more than two lights on or immediately behind the holy table was unlawful as held by Chancellor Errington in *In re St. Saviour's, Hampstead* [1932] P. 134. The petitioners appealed. There was no opposition to the petition.

Sir P. BAKER-WILBRAHAM said that since the hearing in the court below three faculties had been discovered granted in 1926, 1934 and 1940 for an aumbry for reservation in the side chapel and for a small statue of the Madonna and Child therein. Evidence had also since been produced showing that out of 287 parish churches in twenty-seven out of the twenty-nine rural deaneries in the diocese there were eighty-eight with more than two candles on or behind the principal altar, and that out of 3,913 churches in the Province of Canterbury there were 1,013 with more than two candles on the principal altar. The value of such evidence might be questioned, but it could not be disregarded. The earlier ritual cases of the nineteenth century were not concerned so much with the number of altar lights as with the legality of having any at all. Since *Read* v. *Bishop of Lincoln* [1892] A.C. 644 the whole situation had been altered, and it was now the common practice to allow two lighted candles on or behind the holy table, and the fact that they were lighted before and kept alight during the service of Holy Communion was not a ceremonial use. But the authorities were not conclusive as to the number of lights. In *Rector and Churchwardens of Capel St. Mary, Suffolk* v. *Packard* [1927] P. 289 a faculty was issued for the removal of four out of six candlesticks on a retable, but in that case there had been ceremonial use of lights which could not be justified. It was not a clear decision on the legality of six lights. In the recent case of *In re Holy Trinity, Woolwich* [1949] P. 369 Chancellor Garth Moore granted a faculty for six candlesticks in place of two, subject to a direction that the Bishop must be consulted and decide the number to be used. It was unfortunate that he (the Dean) had not had the advantage of hearing argument on both sides. But he came to the conclusion that although the use of two altar lights was the traditional and recognised use in the Church of England, there was nothing illegal in the use of more lights, lit on the more important occasions, the sung eucharist and choral evensong, to give more dignity to the service. The circumstances of the present case were special; six candlesticks had been so used for nearly sixty years, and if they had been saved from the fire would have been replaced without question. The faculty should be amended so as to include all the six candlesticks. It was within the discretion of a diocesan chancellor, in a proper case, to allow more than two, but the discretion must be exercised with great care. The appeal would therefore be allowed.

APPEARANCES: *G. Hutchinson*, K.C., *Humphrey King* and *Michael Chavasse* (*Trollope & Winckworth*). Mr. King died before judgment was given.

[Reported by H. LANGFORD LEWIS, Esq., Barrister-at-Law.]

REVIEW

The Law of Stamp Duties. By E. G. SERGEANT, O.B.E., LL.B., Solicitor, of the Office of the Solicitor of Inland Revenue. Second Edition. 1950. London: The Thames Bank Publishing Co., Ltd. 43s. net.

The law of stamp duties is by its nature extraordinarily diffuse, and the difficulties of avoiding contagion with this quality in writing an account of this branch of the law must not be underrated. Nevertheless, an author who follows the method of treatment adopted in this book (an arrangement which is not, unfortunately, unique, so far as this topic is concerned) appears to put unnecessary difficulties in between his readers and the information which they seek. The arrangement is to print the text of the statutes, or portions of statutes, dealing with stamp duties in their chronological order, with the author's notes following each section or sub-section requiring annotation. The inconvenience of this arrangement can be illustrated by the fact that a reader requiring information on such a practical question as whether a certificate of value may properly be included in an assurance of land prepared in pursuance of a contract for the sale of a shop with the goodwill and stock-in-trade of the business carried on thereon will have to consult four separate passages in this book (pp. 92, 206, 251 and 259) before he can satisfy himself of the present law on this point. (And even then he will find the not particularly lucid provisions of the Finance Act, 1949, printed without the benefit of the author's notes.)

Are difficulties of this kind, which are not confined to the case of the particular question instanced above, really necessary? Is it not possible for the law of stamp duties to be treated, as the equally intractable law of death duties has been treated, in chapter form, so that all the law on at least the main heads of charge may be gathered together in one place? A number of such heads suggest themselves: Bills of Sale, Company Documents, Conveyances and Transfers on Sale, Mortgages, Settlements are some of the more obvious; it is under these heads that the most important duties fall and most of the real difficulties occur. The less important items, which in practice present few difficulties, could then be treated shortly in alphabetical order at the end. An arrangement of this kind would relegate the text of the relevant statutes to an appendix; and it would doubtless lead to some duplication; but is that any disadvantage in a book on such a subject, which is intended to be consulted, not read? The author who would desert the traditional arrangement of his subject-matter for some scheme of treatment on these lines would confer a notable benefit on his fellow practitioners.

But to return from the ideal to the actual: within the limitations imposed on him by a defective arrangement, Mr. Sergeant has written a useful book. It is comprehensive (although perhaps a few notes on the more recent legislation would not be out of place); it is clearly written, and so far as it has been possible to test it, entirely accurate. The only serious defect is the index, which falls far below the standard set by the text. If the next edition of this book is not (as may be hoped) entirely re-written on other lines, the present index at least ought to be scrapped and a new start made in this direction.

SURVEY OF THE WEEK

ROYAL ASSENT

The following Bill received the Royal Assent on 18th September:—

National Service

To substitute twenty-four months for eighteen months as the term of whole-time service under the National Service Act, 1948, and for purposes connected therewith.

STATUTORY INSTRUMENTS

Act of Sederunt (Legal Aid Rules) 1950. (S.I. 1950 No. 1516.)
Boston Water Order, 1950. (S.I. 1950 No. 1500.)
Chocolate, Sugar Confectionery and Cocoa Products (Amendment No. 4) Order, 1950. (S.I. 1950 No. 1488.)
Cinematograph Film (Control) (Revocation) Order, 1950. (S.I. 1950 No. 1469.)
Cutlery Wages Council (Great Britain) (Constitution) Order, 1950. (S.I. 1950 No. 1490.)
Education (Scotland) Miscellaneous Grants (Amendment No. 1) Regulations, 1950. (S.I. 1950 No. 1481.)
Export of Goods (Control) (Amendment No. 4) Order, 1950. (S.I. 1950 No. 1499.)
Fats, Cheese and Tea (Rationing) (Amendment No. 3) Order, 1950. (S.I. 1950 No. 1482.)
Import Duties (Drawback) (No. 8) Order, 1950. (S.I. 1950 No. 1519.)
Legal Aid (Scotland) Act, 1949 (Commencement) (No. 2) Order, 1950. (S.I. 1950 No. 1512.)
Legal Aid (Scotland) (Assessment of Resources) Regulations, 1950. (S.I. 1950 No. 1514.)
Legal Aid (Scotland) (General) Regulations, 1950. (S.I. 1950 No. 1513.)
London-Penzance Trunk Road (The Triangle and South Street, Yeovil) Order, 1950. (S.I. 1950 No. 1475.)
National Health Service (General Medical and Pharmaceutical Services) Amendment (No. 2) Regulations, 1950. (S.I. 1950 No. 1486.)
Perth-Aberdeen-Inverness Trunk Road (Inverkeilor Diversion) Order, 1950. (S.I. 1950 No. 1484.)
Plywood Prices (Amendment No. 3) Order, 1950. (S.I. 1950 No. 1491.)
Rating and Valuation (Fees for Statements) Regulations, 1950. (S.I. 1950 No. 1497.)

Prices for copies of statements prepared by the Minister for each rating area as to 1938 construction and site costs are fixed by these regulations. It is on these statements that the valuation of certain classes of houses and buildings under the Local Government Act, 1948, is to be based.

Retail Furnishing and Allied Trades Wages Council (Great Britain) Wages Regulation Order, 1950. (S.I. 1950 No. 1489.)
Safeguarding of Industries (Exemption) (No. 10) Order, 1950. (S.I. 1950 No. 1470.)
St. Neots Water Order, 1950. (S.I. 1950 No. 1474.)
Stopping up of Highways (Essex) (No. 3) Order, 1950. (S.I. 1950 No. 1504.)
Stopping up of Highways (Gloucestershire) (No. 5) Order, 1950. (S.I. 1950 No. 1496).
Stopping up of Highways (Lancashire) (No. 8) Order, 1950 (S.I. 1950 No. 1476.)
Stopping up of Highways (North Riding of Yorkshire) (No. 3) Order, 1950. (S.I. 1950 No. 1502.)
Utility Apparel (Gaberdine Raincoats) (Manufacture and Supply) Order, 1950. (S.I. 1950 No. 1478.)
Utility Apparel (Women's Domestic Overalls and Aprons) (Manufacture and Supply) (Amendment No. 4) Order, 1950. (S.I. 1950 No. 1479.)
Utility Cloth and Utility Household Textiles (Maximum Prices) (Amendment No. 11) Order, 1950. (S.I. 1950 No. 1466.)
Utility Handkerchiefs (Maximum Prices) (Amendment No. 6) Order, 1950. (S.I. 1950 No. 1465.)

NON-PARLIAMENTARY PUBLICATIONS

H.M. LAND REGISTRY. Practice Leaflet for Solicitors No. 2.

This leaflet recapitulates the rules to be complied with in order to facilitate the making of postal searches at the Land Registry under the Land Registration Rules, 1930.

NOTES AND NEWS

Honours and Appointments

The Attorney-General has appointed Mr. S. B. R. COOKE to be junior counsel to the Ministry of Labour and National Service in succession to Mr. B. J. McKenna.

Mr. H. C. NEWSTEAD, assistant clerk to Otley Magistrates for forty-nine years, has been appointed clerk to the Bench in succession to Mr. G. B. Harrison, of Skipton, who has resigned on account of ill health. Mr. Newstead's great-grandfather, grandfather and great uncle have all held this post.

Personal Notes

Mr. John Victor Lloyd-Jones, solicitor, of Caernarvon, was married on 11th September to Miss Vida M. Thomas Jones, of Caernarvon.

Mr. W. G. Nixon, solicitor, of Redcar, was married on 9th September to Miss Joyce Dixon, of Redcar.

Mr. Desmond Pye, solicitor, of Clacton, was married on 9th September to Miss Marian Creed, of Colchester.

Miscellaneous

The next General Quarter Sessions of the Peace for the Borough of Walsall will be held at the Guildhall, Walsall, on 12th October, at 10 a.m.

A course of three lectures by Professor Dr. W. Holtzmann, Professor of Medieval and Modern History, University of Bonn, will be given at the Senate House, University of London (entrance from Malet Street or Russell Square, W.C.1), at 5.30 p.m., on 16th, 17th and 18th October, 1950. Syllabus: Lectures I and II —Medieval Empire and Nations; Lecture III—Recent Studies of Canon Law. At the first lecture the chair will be taken by Professor J. G. Edwards, Professor of History and Director of the Institute of Historical Research, University of London. The lecture is addressed to students of the University and to others interested in the subject. Admission is free, without ticket.

OBITUARY

MR. F. W. BUTLER

Mr. Frederick William Butler, solicitor, of Horsham, died on 9th September, aged 91. Admitted in 1884, he was Coroner for the Horsham district from 1896 to 1948.

MR. H. COATES

Mr. Herbert Coates, solicitor, of Bristol, died recently, aged 92. He was admitted in 1883.

MR. W. H. JAGO

Mr. William Henry Jago, solicitor, of Plymouth, died on 9th September, aged 87.

MR. D. O. OGDEN-SWIFT

Mr. Donald Ogden Ogden-Swift, barrister-at-law, of the North-Eastern Circuit, has died while on holiday in Spain, aged 38. He was admitted a solicitor in 1934, and was assistant solicitor to Leeds Corporation from 1935 to 1938. He was called by the Middle Temple in 1942.

MR. A. H. THAKE

Mr. Arthur Henry Thake, a member of the staff of Messrs. Wade and Jackson, of Hitchin, for half a century and their managing clerk for many years, has died at the age of 67.

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